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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

v.

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,
Respondents.

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

THE INTEREST OF AMICUS CURIAE

The Association of American Publishers, Inc. (AAP) submits this brief Amicus Curiae (with the consent of the parties) in support of Petitioners, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. For the reasons discussed below, AAP urges that the decision of the Court of Appeals be reversed and that this Court reinstate the conclusion of the District Court that Respondents infringed the Petitioners' copyright by reproducing without authorization excerpts from the Petitioners' about to be published manuscript.

AAP is a trade association of book publishers in the United States. Its more than 300 member companies and subsidiaries publish between 70% and 75% of the dollar volume of all books published in the United States. These publications include

biographies of and autobiographies by public figures, histories, and other works of non-fiction, as well as of fiction. Virtually all of such publications are protected by copyright.

As publishers, AAP members have a direct and compelling interest in both Constitutional provisions put at issue by the court below: the Copyright Clause (Art. I, § 8, cl. 8) and laws enacted thereunder; and the First Amendment. AAP members invest substantial resources in the acquisition, development, editing, and marketing of their works, and are at the heart of the publishing process through which literary works are made available to the public.

The decision of the court below poses a false dichotomy between copyright and First Amendment considerations, ignores authors' and publishers' fundamental right of first publication, sanctions serious interference with the publishing process, and substantially limits the protection of non-fiction works against non-literal copying. To the extent that these conclusions may be sustained, the interests of AAP members—indeed, of all who write and read biographies, histories, autobiographies and other non-fiction works, and of the public—would be seriously prejudiced.

PRELIMINARY STATEMENT: PUBLISHERS, THE FIRST AMENDMENT, AND COPYRIGHT

This case must not be viewed as pitting a "pro First Amendment press" against an "anti First Amendment publishing industry." Book publishing is an endeavor that thrives on First Amendment freedoms no less than the efforts of the working press. It is clear that AAP members' books are entitled to the same First Amendment protections as are newspapers and magazines. *E.g., Lovell v. Griffen*, 303 U.S. 444, 452 (1938); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *Smith v. California*, 361 U.S. 147, 150 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963). Book publishers have not been insensitive to the preservation of these values. Publishers and their authors:

> "... have fought—often courageously and at great personal sacrifice—against efforts at suppression and censorship inspired by political, philosophical, religious, and moral persuasions. Had it not been for the battles and unceasing vigilance of many authors and publishers some great works of philosophy, religion, political theory, and literature would not now be available in libraries and bookstores."

J. Dessauer, *Book Publishing* 15 (1974).

But if the First Amendment is the moral force of publishing, copyright is its commercial foundation. For the most part, and in this case, these twin underpinnings of book publishing—copyright and the First Amendment—do not conflict. This is not surprising, for copyright and the First Amendment are essentially complementary.[1]

Freedom of expression is meaningless unless works are created and distributed. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) this Court recognized the "economic stake" of book publishers in recouping their publishing investment and concluded that protection of this interest would serve the First Amendment. Our copyright law is based on the principle that:

> "... encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the Useful Arts.'"

Mazer v. Stein, 347 U.S. 201, 219 (1954). *See also, e.g., Sony Corporation of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S. Ct. 744, 782 (majority opinion per Stevens, J.) & 806-07 (dissenting opinion per Blackmun, J.), *reh'g denied*, 104 S. Ct. 1619 (1984). Thus, the copyright law assures that there is opportunity for recoupment of the intellectual and

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[1] The Constitutional authority for copyright laws is, in fact, premised on the principle that "The public good *fully coincides* with the claims of individuals ...." J. Madison, *The Federalist* No. 43 at 279 (Mod. Lib. ed. 1941) (emphasis added).

financial investment of authors and publishers, that their creative efforts are maintained, and that their works are made available to the public.[2] It is essential to the purpose of the First Amendment.

These principles are no less applicable to the written reflections of former public officials:

> "Indeed, if the doctrine were otherwise, that no person, or his representatives, could have a copyright in his own private or familiar letters, written to friends, upon interesting political and other occasions, or containing details of facts and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty than they otherwise would be. What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave. To this we owe, not merely, the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished statesmen of our own country."

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[2] This case no more involves a contest between "publishers" and the "press" than it does between First Amendment/copyright interests or First Amendment sympathies. Book publishers play as key a role in bringing newsworthy materials before the public as do newspapers, magazines, and television and radio newscasts. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffen*, 303 U.S. 444, 452 (1938).

Folsom v. Marsh, 9 F. Case 342, 346-47 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.).

The majority of the Court of Appeals ignored this coincidence of copyright and First Amendment interests. Its First Amendment concerns (723 F.2d at 197, 203, 204, 209) may be legitimate in the abstract, but they should not have been applied to the facts of this case or to eliminate consideration of the unpublished nature of Respondents' work (Point I) or restrict protection of non-fiction works against non-literal copying (Point II).

This case is based on the unauthorized reproduction of substantial expression from an unpublished, but about to be published manuscript. Respondents unjustifiably intruded into the publishing process and destroyed the value of Petitioners' first serial rights and the imminent authorized publication of the work in a mass circulation weekly. Vindication of Petitioners' position here will not, as the Court of Appeals majority feared, "impede the harvest of knowledge . . . ." (723 F.2d at 197). To the contrary, it will preserve the integrity of the publishing process, maintain the copyright principle of economic incentive, and assure the First Amendment interest in public availability of creative works. It will, in short, keep both copyright and the First Amendment in vital balance.

SUMMARY OF ARGUMENT

Congress intended that the fair use doctrine be "narrowly limited" in its application to unpublished works, and that "under ordinary circumstances" it should not be applied to privilege the unauthorized reproduction of such works. The Court of Appeals erred in failing to consider this principle.

There are no extraordinary circumstances that would justify the application of fair use to Respondents' unauthorized use of Petitioners' unpublished manuscript in this case. The manuscript had not been disseminated and was about to be published by Petitioners and their licensee in any event.

The limited applicability of fair use to unpublished works, and its inapplicability in this case, is based on fundamental principles of fairness, privacy, and protection from commercial injury.

The Court of Appeals also erred in limiting the copyright protection of a non-fiction work against unlawful paraphrasing to instances where "virtually the entire work" is taken.

ARGUMENT

I. The Court of Appeals Erred in Failing to Consider the Unpublished Nature of Petitioners' Work. Respondents' Copying Was Not a "Fair Use" of Petitioners' Unpublished Work.

At the time of its receipt by Mr. Navasky and of the appearance of the *Nation* article, Petitioners' manuscript was as yet unpublished. Publication in both abridged, i.e., first serial, and full book-length form was, however, imminent. Respondents, having ascertained the manuscript's book and first serial publication schedule, were well aware of this.[3] The District Court properly concluded that:

> "The copyrighted work is an unpublished, autobiographical manuscript, entitled to copyright protection. The fair use defense is narrowed when the work is unpublished."

District Court Conclusion of Law 6(b); see also, the District Court's opinion, 557 F. Supp. at 1072 ("... the infringed work was soon to be published.") In reversing the decision of the District Court, the Court of Appeals totally ignored this factor.

The Court of Appeals' failure to consider the unpublished nature of the copyrighted work was error. For the reasons given below, under the circumstances of this case Respondents' copying from such material cannot be justified as a fair use.

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[3] 557 F. Supp. at 1069. Excerpts from the manuscript were to be first published in the April 23, 1979 issue of *Time* magazine, which would reach the newsstands on April 16. Shipment of hard cover books was to follow on April 24 or 25 for availability in bookstores on May 1. District Court Findings of Fact 26, 27. Respondents, conceding their purpose to "scoop" authorized publication, had determined Petitioners' publication schedule and caused the *Nation* article to be placed on sale by April 3. District Court Findings of Fact 34, 67.

Among the exclusive rights of a copyright owner is that of "first public distribution". 17 U.S.C. 106(3); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 58 (1975). This right of first publication is a fundamental attribute of copyright ownership. In its reports accompanying the 1976 Copyright Act, Congress clearly expressed its intent that:

> *"The applicability of the fair use doctrine to unpublished works is narrowly limited* since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. *Under ordinary circumstances the copyright owner's 'right of first publication' would outweigh* any needs of reproduction for classroom purposes." (Emphasis added)

S. Rep. No. 94-473, *supra* at 64; H.R. Rep. No. 83, 90th Cong., 1st Sess. 34 (1967). This language is not expressly repeated in the 1976 House Report (H.R. Rep. No. 94-1476, *supra*) but its omission has no significance since the 1976 House Report reviewed, approved, and incorporated the fair use analyses of the 1967 House and 1975 Senate reports by reference. See H.R. Rep. No. 94-1476, *supra* at 67.

Similarly, the references in the reports to "classroom" use arise only from the fortuitous appearance of this point during the discussion of educational copying. They do not indicate that a different standard applies to other uses.[4] The pertinent reports expressly state:

> "The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. *It must be emphasized again that the same general*

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[4] *Cf.*, for example, the discussion in the classroom context of the pertinence of "nonprofit" use and the use of "excerpts and quotations," in S. Rep. No. 94-473, *supra* at 63-65. It can hardly be argued that these considerations are irrelevant in other contexts. See, e.g., *Sony Corporation of America v. Universal City Studios, Inc.*, ____U.S.____, 104 S. Ct. 774, 795 n.40, *reh'g denied*, 104 S. Ct. 1619 (1984).

> *standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case."*[5]

H.R. Rep. No. 94-1476, *supra* at 72 & S. Rep. No. 94-473, *supra* at 65 (emphasis added); and

> "... it should not be inferred that uses of copyrighted material for instructional purposes are subject to different criteria from uses for other purposes."

H.R. Rep. No. 83, *supra* at 32.

In their Brief in Opposition to the petition for certiorari (at p. 13), Respondents appear to argue that the legislative reports' comment on fair use of unpublished works is merely a rebuttal of an alleged "presumption" of fair use for out-of-print works. This construction is wholly strained. Nothing in the reports remotely suggests any pertinent congressional intent other than to "narrowly limit" fair use of unpublished works. If anything, the reports' distinction between previously published but out-of-print works and unpublished works demonstrates that Congress intended to fully reserve the copyright owner's right of *first* publication except in extraordinary circumstances.

In sum, it is clear that Congress intended a "narrowly limited" application of the fair use doctrine to unpublished works, and that—other than in extraordinary circumstances—fair use should not justify an unauthorized first publication.

In its recent decision in *Sony Corporation of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S. Ct. 774 (at 791 n.29, 792 n.32 and 795 n.40), *reh'g denied*, 104 S. Ct. 1619

[5] Application of the various factors of fair use will, of course, vary from "case to case" in determining the final balance. Our point is that the Court of Appeals erred in not applying the factor of "unpublished work," that Congress has clearly given a particular weight to this factor absent extraordinary circumstances, and that under all the circumstances of *this* case, the Respondents' use of the unpublished Ford memoirs was not fair.

(1984) this Court relied upon the 1976 Act's legislative reports as meaningful guidelines to application of the fair use doctrine.[6] The Court of Appeals' failure to consider Congress' intent to limit fair use of unpublished works to exceptional cases was erroneous. Moreover, there are no pertinent circumstances that would permit the application of fair use in this case.

AAP does not contend that there can never be a fair use of an unpublished work. The qualification in the legislative

[6] For a recent decision in which the court—as did the District Court in this case—properly noted the unpublished nature of plaintiffs' work and Congress' intent to narrowly restrict fair use of such works, see *Schuchart & Associates Professional Engineers, Inc. v. Solo Serve Corporation*, 220 U.S.P.Q. 170, 182 (W.D. Tex. 1983). Other cases in which the courts have relied on the congressional reports in deciding questions of fair use under the 1976 Act include *Marcus v. Rowley*, 695 F.2d 1171, 1175, 1177-78 (9th Cir. 1983); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 97 n.4 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Encyclopaedia Brittannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1175, 1177, 1179 n.19 (W.D.N.Y. 1982) and 558 F. Supp. 1247, 1250-51 (W.D.N.Y. 1983); and *Italian Book Corp. v. American Broadcasting Cos., Inc.*, 458 F. Supp. 65, 70-71 (S.D.N.Y. 1978).

In *Diamond v. Am-Law Publishing Corp.*, Copr. L. Rep. (CCH) ¶ 25,627 (S.D.N.Y. 1984) the court did apply fair use to a newspaper's publication of excerpts from a letter written to it. Although the letter had been intended for publication by the newspaper, plaintiff objected to the printing of less than its entirety. Even if we assume the letter was "unpublished" (this is not clear from the opinion and it is not beyond reasonable possibility that plaintiff showed or circulated copies to others), the decision does not undermine *amicus'* position here. First, because the court did not pass upon the issue and thus, at most, simply erred in failing to consider it. Second, and more important for present purposes, plaintiff had communicated the letter to defendant *for publication* and the court concluded that "[i]n writing his version of the facts to the American Lawyer, plaintiff had no right to commandeer the space of the publication for *all* that he wished to say." (emphasis added.) *Id.* at 18,825. This case can well be considered to involve extraordinary circumstances. Indeed, it appears to fall within an exception *amicus* concedes for disclosed but unpublished works. See text and n.7-8 below; *cf. Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. February 1963) (disclosure of manuscript permitting fair use by recipient).

reports that the right of first publication will prevail "under ordinary circumstances" leaves the way open for a different result in other circumstances.

Such circumstances could arise in connection with the limited circulation of a literary work that has not yet been published. If, for example, a publisher prior to publication should distribute a few copies of the work to critics for review, or make a copy available to a journalist for publicity, it might under appropriate circumstances be precluded from claiming infringement by publication of a review or article including quotations from the work. Similarly, if a work should be "performed" on stage or television, one could hardly claim that a critical account or news report of the work including reasonable excerpts is barred from fair use. [The "performance" (including telecasts) of a work is not a "publication." See 17 U.S.C. § 101 (definition of "publication").]

It is most likely that variations upon this theme of "disseminated but unpublished" works were a principal consideration behind the reports' cautionary use of "ordinary circumstances."[7] However, no such situation is presented here. Respondents gave the *Nation* no prepublication copy,[8] and there

[7] During the early discussions of proposals for copyright revision, it was specifically noted that fair use should apply to disseminated or disclosed, but technically unpublished, works. Illustrations of critical reviews of televised plays and reports by columnists who were shown prepublication manuscripts were expressly given. *See Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on The General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. Feb. 1963) (Colloquy among Register of Copyrights Kaminstein, Harry Olsson, Esq. and John Schulman, Esq.). The meetings at which these discussions took place were noted in the House and Senate reports accompanying the 1976 Copyright Act. See S. Rep. No. 94-473, *supra* at 47; H.R. Rep. No. 94-1476, *supra* at 47. A like point was made in one of the leading fair use articles published prior to the reports, Cohen, *Fair Use In The Law of Copyright*, 6 Copyright Law Symp. (ASCAP) 43, 51 (1955).

The likelihood that the cautionary language in the legislative reports was motivated by realistic considerations pertaining to "disseminated but unpublished" works is also suggested by a corresponding development in British-law countries under the analogous concept of "fair dealing." Thus, in the United Kingdom such early cases as *Prince Albert v. Strange*, 2 DEG. & SM

(footnote 7 and 8 continues)

was no prepublication performance, circulation, or other pertinent disclosure of the manuscript. *See* District Court Finding of Fact 30.

(footnote 7 and 8 continued)

652 (1849) and *Macklin v. Richardson*, Amb. 694, Case 341 (1770) were often considered to preclude the defense of fair dealing in the case of unpublished works. See, *e.g.*, A. Weil, *American Copyright Law* 115 (1917); *Copyright and Designs Law—Report of the Committee to Consider the Law on Copyright and Designs* (Whitford Report) 172 at ¶676 (March 1977) ("... there should be full freedom to criticise and comment upon all *published* works ...") (emphasis added). However, it was soon understood that fair dealing could apply to dramatic and musical works that were publicly performed. *E.g.*, *British Oxygen Company, Ltd. v. Liquid Air, Ltd.*, [1925] Ch. 383, 393; M. Flint, *A User's Guide to* [*U.K.*] *Copyright* § 10.06 at 50 (London, 1979); W. Copinger & E.P. Skone James, [*U.K.*] *Copyright* § 463 at 178 (London, 10th Ed., 1965). Doubt remained that fair dealing could apply to unpublished literary works. *British Oxygen Company, Ltd. v. Liquid Air, Ltd., supra.* However, in *Hubbard v. Vosper*, [1971] 1 All E.R. 1023, 1027-28 (involving the use in a book of letters circulated to members of a religious group) the court concluded that: "Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is 'fair dealing' to criticise it in a newspaper, or elsewhere. This happens sometimes when a company sends a circular to [its] shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it and to criticise them—or review them—without thereby being guilty of infringing copyright." This was followed in *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241, 263 in which the court defined the factors relevant to the issue of "fair dealing" with a literary work as "whether the work is unpublished; and the extent to which the work has been circulated, although not published to the public within the meaning of the Copyright Act." (The court refused to sustain the defense of fair dealing, noting *inter alia*, that the work was unpublished and had not been made available, and that the memorandum in question was "obtained and used without the author's consent in the correct conviction that, if consent had been sought, it would have been refused."). Similarly, in *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, [1974] 1 All E.R. 41, 52 the court entered an interlocutory injunction since it "doubt[ed] whether the plaintiff's documents could be said to have been circulated so widely that, though not published generally, it is fair dealing to criticise them." *See also, Hindley v. Higgins*, Ct. App., Civ. Div., Aug. 24, 1983 (unpublished; on Lexis) (only possibility of prior publication might justify fair dealing). (In an exceptional case, *Lion Laboratories v. Evans*, [1984] 2 All E.R. 417, the court lifted an interlocutory injunction, leaving substantive issues for trial, where the copyright claim would have suppressed awareness of documents

(footnote 7 and 8 continues)

Another extraordinary circumstance could arise if a plaintiff were seeking to use the copyright law to suppress disclosure of information of overriding public importance. *Cf. Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). But this situation does not arise here. The basic facts and events related in the work—as distinguished from their literary expression resulting from the collaborative efforts of President Ford, Mr. Armbrister, and Petitioners—had already been made public (District Court Findings of Fact 23, 44, 45) and even the use of facts and events from the manuscript would not be precluded by Petitioners' copyright claim.[9] Most importantly, the *Time* article and the book itself were shortly to be published in any event. Upon

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(footnote 7 and 8 continued)

casting doubt on the validity of plaintiff's device, which was used as the basis of current criminal prosecutions. Unlike the present case, the documents in *Lion* were considered of vital current importance to the administration of criminal justice, and were not going to be published by their holder. See p. 12, *infra*.)

Similarly, Canadian law has been said to bar fair dealing in unpublished works. *E.g.*, H. Fox, *The Canadian Law of Copyright* 425 (Toronto, 2d Ed. 1967); A. Keyes & C. Brunet, *Copyright in Canada—Proposals For A Revision of the Law* 148 (Consumer & Corporate Affairs Canada 1977). However, a copyright revision study recommended that fair dealing should be applied to both generally published and performed works. B. Torno, *Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision* 38 (Consumer & Corporate Affairs Canada 1981). Most recently, the Canadian Government proposed that a new Canadian fair use doctrine "apply to all copyrighted subject matter *that has generally been made available to the public, regardless of whether such material has been published in the traditional sense.*" J. Erola & F. Fox, *From Gutenberg to Telidon—A White Paper on Copyright: Proposals for Revision of the Canadian Copyright Act* 40 (Consumer & Corporate Affairs Canada 1984) (Emphasis added).

[8] The instant case is therefore clearly distinguishable from *Diamond v. Am-Law Publishing Corp.*, *supra* n. 6. Additionally in this respect, we must note the clandestine source of the manuscript and Mr. Navasky's knowledge that his receipt was unauthorized. See District Court Finding of Fact 33.

[9] 17 U.S.C. § 103(b). *See e.g., New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755, 757 (D. Mass. 1981) (Rejecting fair use defense based on news reporting because, *inter alia*, "while protection of the public right of access to [newsworthy] information is a primary justification for the fair use defense, this right is sufficiently

(footnote continues)

publication in serial and book form, the work and its contents would have been readily available to the public without temporal or other restraints; and copyright would not preclude the *Nation* from prepublication reporting of the facts, ideas, and events in the manuscript or post-publication quotation of reasonable excerpts of expression. (Additionally, the *Nation* acted for commercial self interest. See District Court Findings of Fact 54, 57.) This case thus does not raise the danger of "merely inhibiting access to ideas" that concerned this Court with respect to the prohibition of certain noncommercial uses in *Sony Corporation of America v. Universal City Studios, Inc.*, *supra* 104 S. Ct. at 793. *Cf.*, e.g., *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). ("We conclude that in this case where there is no judicially cognizable allegation that the interested public has been denied access to these works, the balance of the First Amendment interests is, if anything, tilted in the direction of the holders of copyrights.")

Nor are there other extraordinary circumstances that would support the application of fair use to Petitioners' unpublished work in this case. That Petitioners' work represented the memoirs of a former President does not detract from the protection of its expression under the Copyright Act and its underlying principles. *See*, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 346-47 (C.C.D. Mass. 1841) (No. 4,901); p. 4 *supra*. Indeed, if factors extrinsic to the unpublished/undisseminated/soon-to-be published calculus are pertinent here, then one must consider such elements as the spurious provenance of the unauthorized manuscript, and the *Nation*'s knowing receipt and deliberate use of substantial literary expression from an unauthorized source to interfere with Petitioners' customary first serial rights for its self-serving commercial purposes. *See*, e.g., Dist. Ct. Findings of Fact 33, 54, 57, 66, 67. These provide further support for the inapplicability of fair use. See, e.g., *Time, Inc. v. Bernard Geis Associates*, 298 F. Supp. 130, 146 (S.D.N.Y. 1968) ("Fair use presupposes good faith and fair dealing.")

(footnote continued)

protected merely by enabling defendants to report the underlying facts that the plaintiffs' videotapes record. It does not permit defendants to appropriate the plaintiffs' *expression* of that information . . . .") (emphasis in original); *see also*, cases cited at p. 21 of this brief.

The principle that fair use must be narrowly restricted to extraordinary circumstances in the case of unpublished works is not new to the 1976 Copyright Act. It derives from a similar principle under the regime of common law copyright prior to its preemption by the 1976 law.[10] Although Respondents' arguments in the Court of Appeals and in opposition to this Court's grant of certiorari repeatedly denied this general rule, it is more than amply supported. *See, e.g., Press Pub. Co. v. Monroe,* 73 F. 196 (2d Cir. 1896) (by implication); *Golding v. RKO Radio Pictures, Inc.,* 193 P.2d 153, 163 (Cal. Dist. Ct. App. 1948), *aff'd,* 221 P.2d 95 (Cal. 1950); *Stanley v. Columbia Broadcasting System, Inc.,* 35 Cal. 2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc); *Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, supra* n.10 at 40; Latman, *Fair Use of Copyrighted Works,* Copyright Law Revision Study No. 14 at 7 (H.R. Comm. Print, 86th Cong., Sess. 1960); Strauss, *Protection of Unpublished Works,* Copyright Law Revision Study No. 29 at 4, n.32 (H.R. Comm. Print, 86th Cong., 2d Sess. 1960); A. Weil, *American Copyright Law* 115 (1917); H. Ball, *Law of Copyright* 260 n.5 (1944); R. Shaw, *Literary Property in the United States* 67 (1950). See also, P. Wittenberg, *Protection of Literary Property* 125 (1968) ("Before publication there can be no fair use of works protected under common law copyright;" but implying that this remains true only "as long as an author keeps his work confidential and uncommunicated . . ."); Cohen, *Fair Use in the Law of Copyright,* 6 Copyright Law Symp. (ASCAP) 43, 51 (1955) (Suggesting that the general principle precluding fair use of common law works would not apply to publicly performed but unpublished works); *Caliga v. Inter Ocean Newspaper Co.,* 215 U.S. 182, 188 (1909) ("At common law the exclusive right to copy existed in the author until he permitted a

[10] See *Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law* 40 (H.P. Comm. Print, 87th Cong., 1st Sess., July 1961). AAP does not contend that common law copyright *absolutely* precluded fair use in all circumstances. In appropriate cases, such as those involving disseminated but unpublished works, a privilege of fair use may have been accorded at common law had the occasion arose. *See generally,* authorities cited in fn. 7, *supra.*

general publication."); *Atlas Mfg. Co. v. Street & Smith,* 204 F.2d 398, 402 (8th Cir.), *appeal dismissed,* 231 U.S. 348 (1913) (At common law, author had "exclusive right to the first publication" of his work.); *Fendler v. Morosco, infra.*

The authorities relied on by Respondents to refute this proposition are unavailing. In *Fendler v. Morosco,* 253 N.Y. 281, 171 N.E. 56, *reh'g denied* 254 N.Y. 563, 173 N.E. 867 (N.Y. 1930) the court, finding no copying, expressly declined to pass on the fair use question, but did observe: "Since plaintiff had not published or produced her play, perhaps any use that others made of it might be unfair." 253 N.Y. at 291. In *Estate of Hemingway v. Random House, Inc.,* 53 Misc. 2d 462 (N.Y. Sup. Ct.), *aff'd,* 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds,* 23 N.Y.2d 341 (N.Y. 1968), the trial court did refer to fair use in a common law action. However, this was a misuse of the term (or at least a use not pertinent to the doctrine at issue here) since the court was apparently referring to "minor" and "trivial"—i.e., *de minimis*—uses (53 Misc. 2d at 466) which preclude infringement even absent fair use considerations. See generally, 3 M.B. Nimmer, *Nimmer on Copyright* §§ 13.03[A] at 13-32, 13.05 at 13-55—13-56 (1983). Moreover, the trial court also appeared to be referring to the use of *published* materials (53 Misc. 2d at 465-66) or materials intended for general release (i.e., a press release) (53 Misc. 2d at 466). Although the trial court also dealt with alleged infringement of letters and oral conversations, its reference to fair use did not extend to these materials [see 53 Misc. 2d at 467 (letters; no copying) and 468-471 (oral conversations; no right to preclude publication by participant)]. Additionally, the New York Court of Appeals, noting that it was agreeing with the disposition of the case only "on a ground more narrow" than the trial court (23 N.Y.2d at 345), decided the case solely on the ground that defendant's author had implied-in-fact consent from Hemingway for its publication; the appellate court did, however, emphasize the importance of common law rights in protecting against unauthorized disclosure (23 N.Y.2d at 347-48). Finally, it has been suggested that the

action was designed to suppress information. Goldstein, *Copyright and The First Amendment*, 70 Colum. L. Rev. 983, 1004 (1970); *see* p. 12-13, *supra*. The decision, in sum, lends no meaningful support to Respondents' position.[11] Indeed, in view of the express language in the legislative reports, Respondents' denials and purported authorities can have no significance.

In its arguments below, Respondents also relied upon Congress' elimination of the "prepublication/publication distinction" between common law and statutory copyright. Brief of Defendants—Appellants—Cross-Appellees before the U.S.

[11] Respondent also relied on Professor Nimmer's statements that (a) "there are no cases squarely . . . holding [that the defense of fair use was not available at common law]"; and (b) "some [cases] expressly or by implication have denied [the] proposition" that fair use was not applicable at common law. 3 M.B. Nimmer, *Nimmer on Copyright* § 13.05 n.2 (1983). In light of the opinions in *Press Publishing Co. v. Monroe, Golding v. RKO*, and *Stanley v. CBS, supra*, and the fact that in each case defendant was held liable, Professor Nimmer's first point is difficult to accept. The only case cited by Professor Nimmer in direct support of his second point is *Hemingway* which, as indicated above, does not effectively refute the general principle. He also cites (as "see" citations) *Malkin v. Dubinsky*, 203 N.Y.S.2d 501 (Sup. Ct. 1960), *Weitzenkorn v. Lesser*, 40 Cal.2d 788, 256 P.2d 947 (Cal. 1953) and *Fendler v. Morosco, supra*. However, *Fendler*, as noted earlier, expressly stated that use of an unpublished unproduced play might be "unfair," and that decision turned on no copying. *Malkin* turned wholly on the presence of only trivial and insignificant similarities and no copying, and *Weitzenkorn* turned on the lack of copying of protected elements. Neither dealt with fair use as that doctrine is here at issue. Cf. 3 M.B. Nimmer, *Nimmer on Copyright* § 13.05 at 13-55—13-56 (1983); *see also, id.* at § 13.03[A] at 13-32 (references to fair use to cover insubstantial similarity are "unfortunate"). (Perhaps Professor Nimmer's reliance on *Fendler* is attributable to the fact that the opinion includes passing reference to isolated quotations from *Folsom v. Marsh, supra* [253 N.Y. at 291] and an early lecture [253 N.Y. at 292] that are suggestive, at most, of the fair use doctrine as it has since developed. This may also underlie his reference to *Malkin* [see 203 N.Y.S.2d at 507, quoting *Fendler*]. If this is the case, it is a thin reed on which to base refutation of the commonly acknowledged principle that fair use generally did not apply to common law actions, and can be given no significance in light of the statement by the New York Court of Appeals in *Fendler* that any use of an unpublished, unproduced play might be unfair.) In any event, given the clear statements in the legislative reports that fair use of unpublished works must be "narrowly" restricted to extraordinary circumstances, debate over the precise rule at common law has no real meaning here.

Court of Appeals for the Second Circuit at 33. However, the elimination of publication "as a dividing line between common law and statutory protection" (H.R. Rep. No. 94-1476, *supra* at 129, quoted in Brief, *supra* at 33) does not mean that the question of whether a work is or is not published is irrelevant for all purposes. *See, e.g.*, 17 U.S.C. §§ 104, 203, 302, 303, 401, 403, 405-409, 412. In eliminating common law copyright, Congress brought the traditional "right of first publication" under the Federal ambit of protection. *See* H.R. Rep. No. 94-1476, *supra* at 62; S. Rep. No. 94-473, *supra* at 58. And in codifying the doctrine of fair use, Congress did not intend to "change, narrow, *or enlarge it* in any way. H.R. Rep. No. 94-1476, *supra* at 66; S. Rep. No. 94-473, *supra* at 62; *Sony Corporation of America v. Universal City Studios, Inc., supra* at 791-92 n.29 (emphasis added). Respondents' earlier, unwarranted, extrapolation of Congress' intent with respect to the significance of publication ignores these points; but most importantly, their assertion that "there is no basis for concluding that Congress . . . intended" the prepublication/publication distinction to be pertinent to fair use (Brief, *supra* at 33) is expressly contradicted by the legislative reports referred to above.

The principle that application of the fair use doctrine to unpublished works must be narrowly circumscribed is grounded in several basic and related policy considerations. Perhaps most fundamentally, it simply cannot be "fair" to intrude into the process of authorship or publishing and, without authorization, first present the creators' literary expression to the public. This offends not only common notions of equity, but those of privacy as well. The fact that a work is soon to be published does not detract from these considerations. For reasons both personal and economic, the creators of a work must generally have the right to present it in such form, and with such revisions and refinements, as they determine. The right of first publication is an important safeguard of "commercial interest" because it "covers the *critical period* for management of any artistic work, extending from the work's

initiation through its preparation for . . . dissemination." Goldstein, *Copyright and the First Amendment,* 70 Colum. L. Rev. 983, 1004 (1970) (emphasis added). No public interest is served in the ordinary case by depriving authors and publishers of these prerogatives and conferring them on an interloper.

Most importantly, and as occurred here, preemptive publication of a literary work will have a direct adverse impact on the established market for first serial rights in books. *See* District Court Findings of Fact 38, 66; *see also,* 557 F. Supp. at 1072-73. Proper fair use analysis requires consideration of the cumulative effect of many persons engaging in the defendant's activity. *Sony Corporation of America v. Universal City Studios, Inc.,* ____U.S.____, 104 S. Ct. 774, 793, *reh'g denied,* 104 S. Ct. 1619 (1984) (proof that if a particular use "should become widespread it would adversely affect the market" negates fair use); *see generally,* 3 M.B. Nimmer, *Nimmer on Copyright* §§ 13.05[A][4] at 13-65, 13.05[E][4] at 13-84 (1983). It is difficult, at best, to see how first serial rights in non-fiction works can survive in the atmosphere condoned by the Court of Appeals. Yet subsidiary rights, including first serial rights, are of great importance to authors and publishers. Indeed, "in recent years . . . the successful exploitation of . . . subsidiary rights has become a very real necessity, often separating the difference between an unsuccessful and a successful" publishing venture. Marks, *Subsidiary Rights and Permissions* in C. Grannis (Ed.), What Happens in Book Publishing 230 (1967). And single-issue first serial rights of the kind involved here are particularly important to works of non-fiction. See *id.* at 232.

As indicated above, the *potential* adverse market effect of unauthorized first publication goes beyond first serial rights to the value of copyright in the book itself, and of post-publication subsidiary rights, since it deprives the publisher of the opportunity to control the groundwork and planning it considers best suited to the circumstances. Injury to first serial rights is particularly troubling because their careful handling is itself part of the "groundwork" for successful exploitation of a book and post-publication subsidiary rights. *See* Marks, *Subsidiary*

Rights and Permissions, supra at 232; see also, District Court Finding of Fact 41, 67 & 557 F. Supp. at 1072 n.11; *cf. Roy Export Co. v. Columbia Broadcasting System, Inc.,* 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd,* 672 F.2d 1095 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 60 (1983) (harm to original work flowing from inability to protect derivative work). The District Court properly refused to allow Respondents to dictate Petitioners' publishing judgment. *See* District Court Finding of Fact 41 & 557 F. Supp. at 1072 n.11; *cf. New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.,* 215 U.S.P.Q. 755, 757 (D. Mass 1981) ("It is for plaintiffs, not defendant, to determine when and in what manner they choose to exploit their copyright.")

A copyright owner clearly has the right to protection against unauthorized use of its work and actual or potential injury in any significant market, primary or subsidiary. *Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.,* 621 F.2d 57, 62 (2d Cir. 1980); *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.,* 215 U.S.P.Q. 755, 757 (D. Mass. 1981); *Marvin Worth Productions v. Superior Films Corp.,* 319 F. Supp. 1269 (S.D.N.Y. 1970). Thus, usurpation of the right of first publication commonly cannot qualify as fair use, and Respondents' actions cannot do so here.

The Court of Appeals majority accorded the shield of lawful privilege, and the colloquial respectability of "fairness," to the knowing appropriation of substantial portions of literary expression from a clandestinely delivered manuscript that was about to be published, and to the deliberate use of such material to destroy Petitioners' right of first publication. The failure of the Court of Appeals to consider the unpublished nature of Petitioners' work, and its holding of fair use under the circumstances of this case, are a substantial threat to the order and integrity of the publishing process itself, as well as to the economic interests of authors and publishers and, derivatively, the interests of the public. In *Sony Corporation of America v. Universal City Studios, Inc.,* ____U.S.____, 104 S. Ct. 744, 792, 795, *reh'g denied,* 104 S. Ct. 1619 (1984), this Court recently

confirmed that, at bottom, the doctrine of fair use is an "equitable rule of reason." Both equity and reason compel reversal here.

II. The Court of Appeals Erred in Permitting Extensive Paraphrasing of Expression

It is an established and essential principle of copyright law that the mere avoidance of verbatim duplication of expression will not immunize a defendant from infringement. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.), *cert. denied*, 282 U.S. 902 (1931) ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text else a plagiarist would escape by immaterial variations."). The Court of Appeals, while paying lip service to this general rule, nevertheless effectively negated its practical application by limiting it to situations where "an alleged infringer *borrow*[*s*] *virtually an entire work* and attempt[s] to avoid liability by doing little more than changing the verbatim language or slight details . . .," and where "*all of* [*a*] *book* or *all of a chapter* [are taken and the infringer] merely change[s] the language here and there. . . ." 723 F.2d at 203 (emphasis added).

This limitation on protection from paraphrasing of expression is contrary to prior case law. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4, 901) (Story, J.); *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965). It is inherently inconsistent with basic principles of copyright.[12]

[12] A conclusion of copyright infringement requires only a finding of substantial appropriation. Moreover, even quantitatively small takings may amount to infringement if the matter taken is qualitatively substantial. *E.g., Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.*, 621 F.2d 57 (2d Cir. 1980).

Although the Court of Appeals sought to justify its conclusion by reliance on the factual nature of Petitioners' work and First Amendment considerations, the interests of free speech do not require such a restriction in this case. Paraphrasing, as a form of copyright infringement, is merely a more adroit form of copying *expression* than literal repetition. The First Amendment does not require the free use of an author's expression, whether it be taken from the whole or any substantial part of a work.[13] *See Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.* 621 F.2d 57, 61 (2d Cir. 1980); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *New Boston Television, Inc. v. Entertainment Sports Programming Network Inc.*, 215 U.S.P.Q. 755, 757 (D. Mass. 1981).

The publication of autobiographies, biographies, histories, and like fact works is an invaluable contribution to the democratic "harvest of knowledge." A great deal of information would not be part of the public consciousness but for publishers' acceptance of the investments and risks of publication. Copyright provides the security and promise that justifies such undertakings. Publishers regularly license under copyright the use of substantially less than entire works. This Court should not confirm a standard of infringement that will encourage non-literal appropriation of expression and eviscerate meaningful copyright protection of commercially significant, but limited, portions of expression taken in near-literal form from larger works.

[13] An exceptional case might arise in which the information sought to be conveyed and the manner of its expression are so intertwined that the one cannot be communicated without the other. *See Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 80 (1983). In such a circumstance, it may well be that the interests of copyright would have to be subordinated to overriding First Amendment concerns. But no such situation is presented here, since it cannot seriously be argued that whatever newsworthy information was sought to be conveyed by the Nation article—e.g., relating to the Nixon pardon—had to have taken the form of literal or near-literal copying of President Ford's own words.

CONCLUSION

The Court of Appeals erred in defining the scope of protection of Petitioners' work and by applying fair use to its unpublished manuscript. Its decision should be reversed.

Respectfully submitted,

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